TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to N.C.R. App. P. 21 and N.C. Gen. Stat. § 7A-32(c), Petitioner-defendant respectfully petitions this Court to issue its writ of certiorari to review the trial court's order, filed August 13, 2010, denying his Motion for Appropriate Relief without a hearing.

The writ should issue because the State's fingerprint examiner made an improper and misleading conclusion that a smeared, partial latent print absolutely came from Petitioner's finger. The recent 2009 report by the National Academy of Sciences criticizes such an absolute conclusion, because of the subjective nature of fingerprint analysis and the potential biases of fingerprint examiners. The victim could not identify the perpetrator, and the fingerprint evidence was critical for the State's case against Petitioner. The improper and misleading conclusion violates Petitioner's right to due process and led to his conviction and a sentence of 60 years.

STATEMENT OF FACTS

. . . .

Recent studies critical of the fingerprint analysis and the absolute conclusion as those offered by the State's expert in Petitioner's case

"Recognizing that significant improvements are needed

in forensic science," Congress commissioned the National Academy of Sciences (NAS) to conduct a study of forensic disciplines that led to a report published in 2009. NAT'L ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD P-1 (2009) (prepublication copy) (Exhibit A21). The NAS found that with the exception of DNA evidence, "no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." *Id*. at S-5. "Much forensic evidence . . . is introduced in criminal trial without any meaningful scientific validation, determination of error rates, or reliability testing to explain the limits of the discipline." *Id.* at 3-18.

> Even fingerprint analysis has been called into question. . . . , and the suggestion has been made that latent fingerprint identifications may not be as reliable as previously assumed. The question is less a matter of whether each person's fingerprints are permanent and unique — uniqueness is commonly assumed — and more a matter of whether one can determine with adequate reliability that the finger that left an imperfect impression at a crime scene is the same finger that left an impression (with different imperfections) in a file of fingerprints . . . .

Id. at 1-7.

In the United States, the lack of a standard for fingerprint identification means that examiners may reach

different conclusions from the same latent print. *Id*. at 5-9. Fingerprint identification is a subjective assessment. *Id*. at 5-11. Even the friction ridge community (comparing impressions from fingerprint, palm print, and sole prints) "actively discourages its members from testifying in terms of the probability of a match" and from suggesting that a print could not possibly come from two individuals. *Id*. at 5-11.

> Given the general lack of validity testing for fingerprinting; the relative dearth of difficult proficiency tests; the lack of a statistically valid model of fingerprinting; and the lack of validated standards for declaring a match, such claims of absolute, certain confidence in identification are unjustified, the product of hubris more than established knowledge. . . .

Id. at 3-17 (citing J.L. Mnookin, *The Validity of Latent Fingerprint Identification: Confessions of a Fingerprinting Moderate*, LAW, PROBABILITY AND RISK 7(2):127-141 (2008)).

The NAS report also made other observations relevant to Petitioner's case:

- The clarity of the latent prints is a major factor in fingerprint identification. *Id*. at 5-10. "When dealing with a single latent print, however, the interpretation task becomes more challenging and relies more on the judgment of the examiner." *Id*. at 5-10.

- "[A] small stretching of distance between two fingerprint features, or a twisting of angles, can result from either a difference between the fingers that left the prints or from distortions from the impression process." *Id*. at 5-10.

- Biases, sometimes unconsciously engendered, might affect forensic analysts' findings and conclusions. "A common . . . bias is the tendency for conclusions to be affected by . . . how data are presented." For example, forensic analysts can be affected by this bias if they are asked to compare two particular fingerprints — one from the crime scene and one from a suspect — rather than comparing the crime scene latent print with a pool of known fingerprints. Another bias may arise when an examiner becomes "too wedded to a preliminary conclusion, so that it becomes difficult to accept new information fairly and unduly difficult to conclude that the initial hypotheses were wrong." In addition, an examiner's finding might also be influenced by the urgency of the investigation. *Id*. at 4-10. The NAS points to the erroneous identification of the American attorney Brandon Mayfield as someone involved with the 2004 train bombing in Madrid by several FBI fingerprint examiners as an example of how biases can lead to faulty conclusions. *Id*. at 1-8, 1-9.

REASONS WHY WRIT SHOULD ISSUE

This Court has the authority to issue its writ of certiorari to review the trial court's order denying a motion for appropriate relief. N.C.R. App. P. 21(a)(1); N.C. Gen. Stat. § 7A-32(c). The trial court's findings on a motion for appropriate relief are binding if they are supported by competent evidence, and the trial court's conclusions are reviewed *de novo*. *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006).

A defendant may seek appropriate relief when his conviction was obtained in violation of the federal or state constitution, or when new evidence is discovered and has a direct and material bearing on the defendant's guilt. N.C. Gen. Stat. § 15A-1415(b)(3), (c).

I. **THE TRIAL COURT ERRED IN CONCLUDING THAT PETITIONER DID NOT OFFER ANY EVIDENCE, WHEN PETITIONER PRESENTED EXCERPTS OF THE 2009 REPORT BY THE NATIONAL ACADEMY OF SCIENCES AS AN EXHIBIT FOR THE MOTION FOR APPROPRIATE RELIEF.**

N.C. Gen. Stat. § 15A-1420(b) provides that an MAR "must be supported by affidavit or other documentary evidence" if based on facts outside the record and transcript of the case or not within the knowledge of the judge who hears the motion. Petitioner presented as an exhibit in the MAR excerpts of the 2009 report by the

National Academy of Sciences, including an entire section on fingerprint analysis.

In June of this year, the North Carolina Supreme Court joined the United States Supreme Court in recognizing the 2009 "landmark report" by the NAS. *State v. Ward*, 364 N.C. 133, --, 694 S.E.2d 738, 743 (2010) (citing *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009)). The Court in *Ward* quoted with approval the NAS's findings that "[t]he forensic science system, encompassing both research and practice, has serious problems that can only be addressed by a national commitment to overhaul the current structure that supports the forensic science community in this country," and that forensic scientists, many of whom work for law enforcement agencies, "sometimes face pressure to sacrifice appropriate methodology for the sake of expediency." *Id*. Other courts have relied on the 2009 NAS report to limit the testimony of the government expert. *See e.g.*, *U.S. v. Willock*, 696 F. Supp. 2d 536, 546-49 (D. Md. 2010) ("in light of two recent . . . studies [by the researching arm of the NAS] that call into question toolmark identification's status as 'science,' Judge Grimm concluded that toolmark examiners must be restricted in the degree of certainty with which they express their opinions").

The NAS is an honorary society that advises the U.S. government on scientific matters. National Academy of Sciences, *About the NAS*, *at* http://www.nasonline.org/site/PageServer?pagename=ABOUT_main_page (last visited Aug. 19, 2010). Its members are top U.S. scientists elected to NAS "based on their distinguished and continuing achievements in original research." *Id*. Election to the organization is considered one of the highest honors that can be bestowed on a scientist. *Id*. The NAS has nearly 200 members who have won the Nobel Prize. *Id*.

In the past, the NAS also issued similar landmark reports on forensic sciences. For example, in 2004, it published a report finding that certain conclusions drawn from the FBI's practice of comparative bullet lead analysis were not reliable. *Ragland v. Kentucky*, 191 S.W.3d 569, 578 (Ky. 2006). Consequently, the FBI discontinued the analysis, *Ragland*, 191 S.W.3d at 579, and some defendants whose convictions resulted from the FBI agents' bullet lead testimony have gained new trials. *See e.g.*, *id*; *New Jersey v. Behn*, 868 A.2d 329 (N.J. Super. Ct. App. Div. 2005); *Clemons v. Maryland*, 896 A.2d 1059 (Md. 2006).

The MAR statute does not require a defendant show in his MAR that he can establish the facts alleged by a preponderance of the evidence. Instead, an evidentiary

hearing is where he has to prove the facts under such a standard. N.C. Gen. Stat. § 15A-1420(c)(5) ("If an evidentiary hearing is held, the moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion."); *State v. Dickens*, 299 N.C. 76, 85, 261 S.E.2d 183, 188 (1979) (where defendant's allegations raise a question of fact as to his misunderstanding of the plea bargain, an evidentiary hearing must be held in which defendant has burden of proving by a preponderance of evidence every fact essential to support motion); *State v. Hardison*, 143 N.C. App. 114, 120, 545 S.E.2d 233, 237 (2001) (at the hearing on his motion for appropriate relief, the defendant has the burden of establishing the facts essential to his claim by a preponderance of the evidence) (citations omitted).

In addition, "North Carolina does not mandate that admissible evidence must be submitted to an MAR court *before* an evidentiary hearing can be conducted." *Conaway v. Polk*, 453 F.3d 567, 583 (4th Cir. 2006) (emphasis in original) (citation omitted). "Indeed, it would create a 'classic catch-22' if an MAR defendant were obliged to submit admissible evidence to the MAR court in order to be accorded an evidentiary hearing, when the defendant is seeking the hearing because he cannot, without subpoena

power or mechanisms of discovery, otherwise secure such evidence." *Id*. at 584 (citation omitted).

Thus, Petitioner provided documentary evidence from a preeminent source addressing the improper and misleading conclusion by the State's fingerprint expert. The trial court did not address the post-conviction discovery motion, did not hold an evidentiary hearing, and erred in concluding that Petitioner had not provided any evidence.

II. THE TRIAL COURT ERRED IN CONCLUDING THAT THE 2009 REPORT BY THE NATIONAL ACADEMY OF SCIENCES DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE, WHEN THE EVIDENCE WAS DISCOVERED AFTER PETITIONER'S TRIAL AND POST-CONVICTION CHALLENGES AND WOULD PROBABLY LEAD TO A DIFFERENT RESULT IN A NEW TRIAL.

Due process requires the State to prove beyond a reasonable doubt that the defendant committed the charged offense. *In re Winship*, 397 U.S. 358, 364 (1970); *see also* U.S. Const. amend. XIV; N.C. Const. art. I, § 19. When an error involves a violation of federal constitutional rights, it is prejudicial unless it is "harmless beyond a reasonable doubt." N.C. Gen. Stat. § 15A-1443(b). The State bears the burden of demonstrating that the error was harmless beyond a reasonable doubt. *Id*.

A defendant is entitled to a new trial on grounds of newly discovered evidence when the evidence: 1) was

discovered after the trial and was not discoverable by reasonable diligence at the time of trial; 2) was probably true; 3) is material to the issue and not merely impeaching/contradictory or cumulative; and 4) would probably lead to a different result if a new trial were granted. *State v. Britt*, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987).

The NAS report came out after Petitioner's conviction and his subsequent post-conviction challenges and is thus newly discovered evidence. The NAS report is true. It was published and is the result of the work of top scientists in the United States. Our state Supreme Court, the United States Supreme Court, and other state courts have cited it and recognized its significance. The report itself also credited other research studies, the authors of which could have testified about the improper and misleading forensic analysis and opinion by the State's fingerprint examiner at an MAR hearing. In the MAR, Petitioner as an indigent defendant asked for funding to retain an expert and a hearing.

The criticisms in the NAS report are material and not merely impeaching/contradictory or cumulative, such that they would probably lead to a different result if a new trial were granted. "Merely impeaching" is not the same as

impeaching. "Evidence that is 'merely impeaching,' or cumulative, is evidence of a 'quality [that] would not ordinarily make a difference in the jury's verdict.'" *Behn*, 868 A.2d at 344 (discussing the same requirement for newly discovered evidence for case involving the NAS report on bullet lead evidence). "Merely impeaching" is analogous to materiality standard for evaluating undisclosed exculpatory evidence established in *Brady v. Maryland*, 373 U.S. 83 (1963). *Behn*, 868 A.2d at 344.

The SBI agent's absolute conclusion that the latent print came from Petitioner's finger was improper and misleading. The SBI agent portrayed his identification and conclusion as the product of an exact science, even though his analysis was based on a subjective assessment of a single smeared, partial latent print and the assumption that each fingerprint was unique and attributable to just one person.

While the SBI agent testified that he had found a match based on at least ten points of identification, such testimony does not explain how many points of identification and what features of the latent print to be compared are necessary for an identification worthy of confidence. As noted by the NAS report, the lack of a standard for fingerprint identification means that

examiners may reach different conclusions on the same latent print. "[A] small stretching of distance between two fingerprint features, or a twisting of angles, can result from either a difference between the fingers that left the prints or from distortions from the impression process." NAT'L ACAD. OF SCI., STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD 5-10 (2009) (prepublication copy).

Furthermore, the SBI agent's opinion was biased because only Petitioner's known fingerprints were used for comparison with the latent print. Neither the SBI agent nor the latent print collecting agent collected the victim's fingerprints for comparison, contrary to the city bureau's practice, to eliminate her as the source of the latent print found on her own car.

Fingerprint evidence as presented by the SBI agent was the only physical evidence and an indispensable part of the State's case against Petitioner. The agent's testimony carried the aura of science and objectivity, to which the jury tends to attach uncritical reliability. *State v. Helms*, 348 N.C. 578, 583, 504 S.E.2d 293, 296 (1998) (jurors tend to give heightened credence to scientific evidence). Even the North Carolina Supreme Court recognized the crucial role of fingerprint evidence in

Petitioner's case and noted that other evidence was of corroborative value only. Had the SBI agent's improper and misleading testimony on the absolute fingerprint match been excluded, or even rebutted and neutralized, Petitioner probably would not have been found guilty. Thus, the use of such evidence was prejudicial and violated Petitioner's right to due process under the federal and state constitutions.

Neither due process nor the requirements for newly discovered evidence mandates a showing that the fingerprint was not that of Petitioner or that he was factually innocent, contrary to the trial court's conclusion in its order denying the MAR. Moreover, this erroneous conclusion is even more glaring in light of the fact that the court did not rule on Petitioner's post-conviction motion for discovery. In that motion, Petitioner requested the complete files of all law enforcement and prosecutorial agencies involved in his case, as permitted by N.C. Gen. Stat. § 15A-1415(f). The purpose of that post-conviction discovery statute is to assist defendants in investigating, preparing, or presenting all potential claims in a single MAR. *See State v. Sexton*, 352 N.C. 336, 340, 532 S.E.2d 179, 181 (2000) (explaining the purpose of N.C. Gen. Stat. § 15A-1415 before the statute was amended to include

noncapital cases).

III. THE TRIAL COURT ERRED IN CONCLUDING THAT PETITIONER HAD DELAYED IN FILING THE MAR, WHEN IT WAS FILED THE YEAR FOLLOWING THE NAS REPORT, PETITIONER WAS LIMITED BY HIS PHYSICAL CONFINEMENT, AND THE STATE DID NOT SHOW PREJUDICE.

An MAR on newly discovered evidence must be filed within a "reasonable time" of its discovery. N.C. Gen. Stat. § 15A-1415(c). When a statute does not designate a time period, the court must evaluate timeliness under the doctrine of laches. *White Oak Props., Inc. v. Town of Carrboro*, 313 N.C. 306, 310-12, 327 S.E.2d 882, 886 (1985). The doctrine of laches does not depend on the passage of time. *Patterson ex rel. Jordan v. Patterson*, 137 N.C. App. 653, 668, 529 S.E.2d 484, 492 (2000) (citation omitted). It bars a claim only if the delay is: 1) unreasonable; and 2) prejudicial to the opposing party. *Id.*; *see also State v. Setzer*, 21 N.C. App. 511, 204 S.E.2d 921 (1974) (no unreasonable delay in giving defendant a speedy trial, which was held over 13 months after the arrest).

In the present case, the NAS report came out in 2009, which Petitioner did not know about until being informed the undersigned counsel in May 2010. The MAR was filed two months later in July 2010. In the MAR, Petitioner cites *Moore v. Knight*, 368 F.3d 936, 940 (7th Cir. 2004) for the

consideration that any inquiry about whether a prisoner exercised due diligence in discovery a factual predicate has to take into account that "prisoners are limited by their physical confinement." In light of all these considerations, Petitioner presented the claim of newly discovered evidence within reasonable time. In addition, the State did not respond and show any prejudice. Therefore, the trial court erred in concluding that Petitioner had delayed in filing the MAR.

IV. THE TRIAL COURT ERRED IN CONCLUDING THAT THE MAR WAS PROCEDURALLY DEFAULTED, WHEN DEFENDANT PRESENTED NEWLY DISCOVERED EVIDENCE.

An MAR is not subject to procedural default when a defendant shows: a) good cause and prejudice; or b) a fundamental miscarriage of justice if the MAR were not considered. N.C. Gen. Stat. § 15A-1419(b).

Newly discovered evidence fulfills the good cause requirement. N.C. Gen. Stat. § 15A-1419(c)(3). Prejudice is found when a reasonable probability exists that a different result would have occurred but for the error. As discussed above, the NAS report is newly discovered evidence, and it would probably lead to a different result if a new trial were granted.

Alternatively, an MAR is not procedurally defaulted if

the defendant demonstrates that fundamental miscarriage of justice would result if the MAR were not considered. Fundamental miscarriage of justice results when "more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense." N.C. Gen. Stat. § 15A-1419(e)(1). But for the State's witness's improper and misleading opinion, more likely than not the jury would not have convicted Petitioner, as elaborated above.

ATTACHMENTS

Attached to this petition for consideration by the Court are the following exhibits:

. . . .

CONCLUSION

Wherefore, Petitioner respectfully requests this Court to:

1. Issue its writ of certiorari and vacate his convictions;

2. Alternatively, remand the case to the trial court for hearings on Petitioner's Motion for Discovery and Motion for Appropriate Relief before a different trial judge;

3. Order such other relief as to the Court may deem proper.

Respectfully submitted, this the 23th day of August, 2010.

NORTH CAROLINA PRISONER LEGAL SERVICES

Electronically submitted

Hoang Lam
Attorney for Petitioner

PO Box 25397
Raleigh, NC 27611
(919) 856-2200
State Bar 31638
hlam@ncpls.org

VERIFICATION

The undersigned attorney for Petitioner, being first duly sworn, says that I have prepared the foregoing Petition for Writ of Certiorari, and it is accurate to the best of my knowledge, information, and belief.

_____
Hoang Lam

Sworn and subscribed before me
This 23th day of August, 2010.

_____
Notary Public

My commission expires

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Petition for Writ of Certiorari has this day been served by first class mail upon:

. . . .

This the 23th day of August, 2010.

_____
Hoang Lam
Attorney for Petitioner